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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957

No. 15

AMERICAN TRUCKING ASSOCIATIONS, Inc., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 16

RAILWAY LABOR EXECUTIVES' ASSOCIATION et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 19

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern Judicial District of Missouri, Eastern Division.

MOTION OF APPELLEE TO AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 636.

AMERICAN TRUCKING ASSOCIATIONS, Inc., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 637.

RAILWAY LABOR EXECUTIVES' ASSOCIATION et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 651.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern Judicial District of Missouri, Eastern Division.

MOTION OF APPELLEE TO AFFIRM.

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of the Supreme Court of the United States, Appellee Frisco Transportation Company moves the Court to affirm the judgment sought to be reversed by the above numbered appeals on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION.

The jurisdictional requisites are adequately set forth in each of the jurisdictional statements.

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act (49 U. S. C., Section 1 et seq.) are set forth in the appendices to the jurisdictional statements.

BRIEF IN SUPPORT OF THE MOTION.

STATEMENT.

By its opinion, which is reported at 153 F. Supp. 572, the District Court found that an order of the Interstate Commerce Commission entered December 7, 1953, in **Frisco Transportation Company Extension—Joplin—Miami**, 62 M. C. C. 367, should be enjoined in part. The Commission's order revoked and cancelled certificates of public convenience and necessity covering four separate parts (segments) of appellee's motor carrier operation upon the ground that those certificates had been "inadvertently issued" and ordered the issuance of new or amended certificates containing five restrictive conditions.[1] The District Court found that the Commission's action was contrary to Section 212 (a) of the Interstate Commerce Act [49 U. S. C. 312 (a)] under the decision in **Watson Bros. Transportation Co. v. U. S.** (1956), 132 F. Supp. 905, aff. 350 U. S. 927, and that the Commission's finding that the

[1] The conditions imposed by the Commission (l. c. 62 M. C. C. 383) were similar to those considered in U. S. v. Rock Island Motor Transit (1951), 340 U. S. 419. The Commission's order also found that the five conditions should be added to a fifth certificate, which action was affirmed by the District Court.

certificates in question had been "inadvertently issued" was without adequate support in the evidence. The District Court's opinion and its findings of fact and conclusions of law and the Commission's report are reprinted in the appendices to the jurisdictional statements.

Before the Commission and the District Court, appellants and appellee have disagreed as to the legally significant facts in this case. We therefore deem it appropriate to fully state the case so that our position, as well as the opinion of the District Court, may be clearly understood.

Appellee's Operations and the Portions Here Involved.

Appellee, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, operates a motor common carrier service (so-called "all-out" service, i. e., the transportation of general commodities for the public at motor carrier rates on motor carrier billing) over approximately 2,700 miles in the States of Missouri, Kansas, Oklahoma, Texas, Arkansas, Tennessee, and Mississippi, its principal routes extending from St. Louis, Missouri, through Springfield, Missouri, to Oklahoma City, Oklahoma, and to Dallas, Texas, and from Kansas City, Missouri, through Springfield, Missouri, to Memphis, Tennessee, and beyond to Columbus, Mississippi. In addition, it operates a route from St. Louis, Missouri, through Cape Girardeau, Missouri, to Blytheville, Arkansas, which is restricted to the handling of freight in substitute service for its parent Railway Company.

The greater part of appellee's motor carrier system was acquired by the purchase of existing operating rights and physical properties of independent motor carriers pursuant to Section 213 [now Section 5 (2) (b)] of the Interstate Commerce Act. All of these acquisitions were

authorized by the Commission after hearing. The proceedings before the Commission which are the subject of this appeal involved six such segments of appellee's over-all operations, 284 miles in all, but which are so situated that, if restricted as proposed, the value of the balance would be seriously impaired, if not destroyed. Throughout the proceedings before the Commission these segments were referred to by their respective Commission docket numbers which, because of their similarity, are not ideal for descriptive purposes. The District Court referred to these segments by the name of the vendor from whom purchase was authorized and described the segments as follows:

> "• • • These are the 'Cooper' route from Joplin, Missouri, to Carthage, Missouri; the 'Hamm' route from Joplin, Missouri, to Miami, Oklahoma; the 'Tolson' route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the 'Parker' route from Blytheville, Arkansas, to Memphis, Tennessee; the 'Rose' route from Hugo, Oklahoma, to Paris, Texas, and the 'Bennett' route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the 'Rose' certificate the Commission ordered no change. The operating certificate for the 'Bennett' route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activites permitted under the certificate, and hence, under the rule of United States v. Rock Island Motor Transit Co., 340 U. S. 419, 71 S. Ct. 382, 95 L. Ed. 391, rehearing denied 341 U. S. 906, 71 S. Ct. 609, 95 L. Ed. 1344, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate" (l. c. 153 F. Supp. 574).

Since neither the Commission nor the District Court ordered any change in the "Rose" certificate, it is not involved in this appeal; and since the appellee has raised no

objection to the holding of the District Court that the Commission's findings and order in connection with the "Bennett" certificate were proper,[2] this appeal involves only the "Cooper," "Hamm," "Parker," and "Tolson" certificates.

History of These Proceedings.

During the years 1938 and 1939, appellee filed applications to purchase the motor carrier operating rights and properties of "Cooper," "Hamm," "Parker" and "Tolson." After finance hearings were held, examiner's proposed reports were issued in connection with each of these applications, which reports approved the purchase by appellee of the operating rights and properties of these motor carriers and concluded with the following language:

> "[We find that the purchase by appellee of the operating rights and property of Hamm, Cooper, Parker and Tolson upon the terms and conditions set forth in the applications] which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled; provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition."

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[2] See the District Court's conclusion of law No. 4, reprinted in the appendices to the jurisdictional statements.

Division 5 of the Interstate Commerce Commission approved and adopted the reports of the hearing examiners, with one commissioner dissenting in each case (Hamm, 15 M. C. C. 320; Cooper, 15 M. C. C. 317; Parker, 25 M. C. C. 96; Tolson, 25 M. C. C. 96).

Following this action by Division 5 of the Commission, appellee completed the purchases, and operations of the same nature as those conducted by appellee's predecessors in interest were commenced by appellee in early 1939, and have continued without change as to the nature of such operations and without interruption to the present time.

On various dates in 1939[3] the Commission issued orders commonly referred to as "compliance orders" in connection with the "Cooper", "Hamm", "Parker" and "Tolson" purchases which authorized and directed the issuance to appellee of certificates of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle covering operating authority previously applied for by "Cooper", "Hamm", "Parker" and "Tolson". These orders provided for the issuance of certificates **with no restrictions as to the type of motor common carrier service.** The compliance order in the "Hamm purchase" is reproduced in its entirety in Appendix 1. The others contain identical language except as to the description of the operating authority.

On March 31, 1942, in the cases of "Cooper" and "Hamm" and on April 14, 1942, in the cases of "Parker" and "Tolson," the Commission granted to appellee certificates of public convenience and necessity which included *inter alia* the operating rights purchased from these four vendors, which certificates contained no restrictions as to

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[3] "Cooper" purchase March 11, 1939; "Hamm" purchase March 14, 1939; "Parker" purchase June 16, 1939; and "Tolson" purchase July 10, 1939.

the type of motor common carrier service authorized thereunder.

In July, 1941, prior to the issuance of the certificates of public convenience and necessity in the "Cooper", "Parker", "Hamm" and "Tolson" purchases, competing motor carriers filed a complaint with the Commission, alleging that appellee was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that appellee was not operating in violation of the terms of its certificates. **(Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company,** 46 M. C. C. 222.) The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the "Hamm", "Cooper", "Parker" and "Tolson" certificates were issued to appellee had been reopened for further hearing by Division 5 in accordance with its report, 43 M. C. C. 641, which the Commission was reversing. This reopening order which was entered on January 4, 1945, began the proceedings which give rise to this appeal. It reopened for reconsideration the proceedings by which appellee acquired the six segments above described.

The order of January 4, 1945, provided that an examiner's proposed report should be served on the parties and that if any party desired a further hearing a petition for such hearing should be filed with the Commission. No petition for hearing was filed by anyone until after Examiner David Waters filed a proposed report on reconsideration on February 8, 1945. That report recommended that the Commission should find that a reservation had been "inadvertently" omitted from certain of appellee's certificates described above and should therefore impose restrictions on appellee's operations substantially the same

as those in the order of December 7, 1953 (the order which the District Court has enjoined in part). Appellee filed exceptions to this proposed report on March 29, 1945, including therein a motion to rescind the order of January 4, 1945, and discontinue the proceedings.

After the filing of those exceptions, another reopening order was issued by the Commission on May 28, 1945, this time for further hearing. Since that time Examiner Waters' proposed report has been disregarded, although never officially rescinded. By an order issued on March 8, 1946, the Commission set all of the reopened proceedings for hearing before an examiner on April 8, 1946, at Kansas City, Missouri. A transcript of that hearing is part of the record in this case.

At that hearing appellee renewed its motion to discontinue the proceedings and offered two witnesses for the purpose of proving certain matters in connection with that motion. Over appellee's protest, the examiner required appellee to furnish two other witnesses, one of whom was an employee of appellee and the other an employee of its parent Railway Company. Throughout the hearing appellee had a continuing objection to any testimony by the two witnesses which it produced involuntarily.

The evidence taken at this Kansas City hearing constitutes all of the evidence taken at any time by the Commission in connection with the reopened proceedings. No evidence was offered either by the Commission, or any other person, nor was any other hearing ever held.

Suffice it to say that the two witnesses offered by appellee in support of its motion to discontinue the proceedings were an auditor for appellee, who testified concerning the financial status of appellee, and appellee's assistant general manager who offered testimony accompanied by documents to show that the certificates were

issued in the form intended by the Commission (including, *inter alia*, the compliance orders). One witness who was produced at the request of the Examiner and over appellee's objection, testified concerning the rail merchandise operations of the St. Louis-San Francisco Railway Company, and the other witness, produced over appellee's objection, testified concerning the operations of appellee.

On May 17, 1948, a Recommended Report and Order on Further Hearing was filed by Examiners William T. Croft and Beverley S. Simms (the latter not present at the Kansas City hearing). This report recommended that the Commission find that appellee's certificates above-described (except Bennett) were inadvertently issued and that those certificates (except Rose) should be revoked and new or amended certificates issued which would restrict the previously unrestricted operations of appellee over the four remaining segments. The recommended restrictions were, with minor exceptions, the same as those in the report and order of December 7, 1953.

Exceptions to this report were duly filed by appellee on August 28, 1948, and subsequently on October 22, 1951, Division 5 of the Commission issued its Report on Further Hearing (53 M. C. C. 415). This report differed from the report of the Examiners, but upheld its recommended findings with no material change.

On February 1, 1952, appellee filed its petition for reconsideration of the report of Division 5, and on July 7, 1952, the Commission reopened the proceedings for oral argument, which was held on November 19, 1952.

After the oral argument the Commission modified the report of Division 5 by its report dated December 7, 1953, with four Commissioners dissenting and one not participating. The modifications did not affect the findings or change the limitations and restrictions placed upon appellee by the report and order of Division 5. The only

modifications were in language and in some of the reasoning used in reaching the findings (62 M. C. C. 367).

On February 2, 1954, appellee filed its petition for reconsideration of the Commission's report and order, which petition was denied by the Commission's order dated April 4, 1955.

On May 20, 1955, suit was brought under Sections 1336, 1398, 2284 and 2321-2325 of the Judicial Code (28 U. S. C. 1336, 1398, 2284, 2321-2325), in the District Court to set aside the order of December 7, 1953.

After the filing of the complaint, the Interstate Commerce Commission intervened as a defendant without objection by appellee. Various truck lines and associations (the appellants in Nos. 636 and 637) sought leave to intervene as defendants and were granted the right to intervene over appellee's objection after oral argument on the question. The intervening defendants filed answers and defendants United States of America and Interstate Commerce Commission were required on motion of appellee to file amended answers.

The District Court, with one judge dissenting, found, as noted above, that the Commission's order should be enjoined as it applied to the "Cooper," "Hamm," "Parker" and "Tolson" certificates. Two basic reasons, which are best stated in the language of the District Court, were advanced for this ruling:

> "Under the Watson Bros. decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.
>
> • • • • • • • •
>
> "In the instant case the four orders last referred to are without adequate support in the evidence" (l. c. 153 F. Supp. 577).

In the findings of fact and conclusions of law filed subsequent to the District Court's memorandum opinion, these reasons were stated as follows (Conclusions of Law 7, 9, 15, 16 and 17):

"7. Motor carrier certificates duly issued cannot be modified in the manner in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. **Watson Brothers Transportation Company v. U. S.**, 135 F. S. 905 (affirmed 350 U. S. 927).

"9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker and Tolson certificates on the ground that said certificates were 'inadvertently issued,' is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

"15. The Commission's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC 89913, Sub No. 1; MC 89913, Sub No. 3; MC 89913, Sub No. 5, and MC 89913, Sub No. 6, should be enjoined, set aside, suspended and annulled, because said order is contrary to the provisions of Section 212 (a) of the Interstate Commerce Act, 49 U. S. C. A., Section 312 (a).

"16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

"17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled."

On August 12, 1957, the District Court entered judgment enjoining the enforcement of the Commission's order of December 7, 1953, as that order applied to the "Hamm", "Cooper", "Parker" and "Tolson" certificates, and affirming the order as it applied to the "Bennett" certificate.

Three separate appeals from this judgment have been filed: (1) by a trucking association and six independent motor carriers (No. 636), (2) the railway labor unions (No. 637), and (3) the Interstate Commerce Commission (No. 651). The United States of America, a defendant below, did not appeal.

ARGUMENT.

Not one of the eight questions presented in the three jurisdictional statements is substantial, nor does anything stated by appellants establish that the District Court erred in reaching either of its basic conclusions.

Throughout the handling of this case before the Interstate Commerce Commission and the District Court there was a constant attempt by the parties who opposed appellee to raise and try collateral issues based upon warped constructions of the facts and upon a complete disregard of the record. Before the Commission appellee's opponents achieved a measure of success, but the District Court refused to be persuaded by irrelevancies and decided the case upon the basic and controlling issues, both of which are in full accord with decisions of this Court and the applicable statutes. Neither of the District Court's rulings raises any question which is sufficiently substantial to warrant further argument.

By its opinion the District Court has obviated the necessity of any consideration of the many questions and issues now raised by appellants. The opinion of the District Court clearly demonstrates that, even if its reliance upon **Watson** were not warranted, there remains a defect in the Commission's order which a decision on any collateral issue could not cure, for the District Court held that the order of the Commission as it applied to the "Cooper," "Parker," "Hamm" and "Tolson" certificates was without adequate support in the evidence. In fact, a detailed review of the evidence led the District Court to say:

> "While, as set out above, under the Watson Bros. case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the

dissenting opinion in the Watson Bros. case, we would still be of the opinion in this case that the four certificates in question could not be canceled and reissued because no clerical error in fact existed" (l. c. 153 F. Supp. 578).

I.

The Questions Raised in No. 636 Are Not Substantial.

Perhaps the most significant comment that can be made about the first question raised by the appellants in No. 636, viz., whether the District Court erred in holding that the certificates in question were not issued as a result of clerical error, is that no consideration is given by these appellants to Section 212 (a) of the Interstate Commerce Act, the statutory basis of the District Court's decision. These appellants apparently prefer to ignore this statutory basis because it is obvious that if the strict requirements of Section 212 (a) are relaxed, no motor carrier will have any assurance that its certificates will not be revoked upon findings as violative of Section 212 (a) as the findings made by the Commission in this case.

The District Court found that the Commission's finding that the certificates in question were "inadvertently issued" was "without adequate support in the evidence" and expressed the opinion that the evidence compelled the opposite conclusion. In raising their first question these appellants would apparently sweep aside the standard requirement of adequate evidentiary support and substitute therefor speculations and assumptions because they point to nothing in the record which demonstrates any error of the District Court.

The appellants' attempt to distinguish the **Watson** case upon the ground that only lack of notice was the basis of the District Court's opinion and this Court's affirmance is fully answered by the opinion of the District Court here

in its analysis of the dissenting opinion in the **Watson** case (l. c. 153 F. Supp. 576). As noted by the District Court, "the arguments advanced here for the defense are the arguments of the minority opinion in the Watson Bros. case" (l. c. 153 F. Supp. 578). Appellants' further attempt to distinguish **Watson** upon the ground that it involved an independent motor carrier as opposed to a rail-affiliated motor carrier such as appellee herein, rests upon an irrelevancy and is without foundation in Section 212 (a) of the Interstate Commerce Act.

Secondly, appellants in No. 636, upon the assumption that no notice of the Commission's intention to issue unrestricted certificates to appellee was ever given to anyone, question whether the Commission could have validly issued the certificates in question without affording motor carrier protestants who were parties to the antecedent finance proceedings, notice and opportunity to protest. The contention that this presents a substantial question ignores the issuance of the "compliance orders."[4]

A "compliance order" was a standard type of order generally in use in claimed grandfather cases under Section 206 at the time of appellee's original purchases, which provided that upon compliance by applicant, or a successor in interest, with the provisions of Sections 215, 216 and 217, and with the rules and regulations issued under such sections, "a certificate of public convenience and necessity shall be issued" to applicant. Such orders set forth in detail the commodities the applicant was authorized to carry, the routes over which it was authorized to carry the same, and any limitations or restrictions upon the service it was authorized to render and were, under Commission's standard practice, served upon all parties to the proceeding.

If any interested party considered the "compliance order" to be in any respect incorrect, the standard practice

[4] The "Hamm" compliance order is reproduced in Appendix 1.

was for that party to file a protest. See **Crescent Express Lines v. United States** (1943), 320 U. S. 401, 403. After a reasonable time, in the absence of protest from anyone, the certificate was issued.

It will thus be seen that the standard practice (followed here) provided for the very type of notice which appellants now claim was denied in this case. The record in this case may be searched in vain for any indication either that the appellants in No. 636, or any of them, were parties to the original finance proceedings, or that any of such parties failed to receive notice of the Commission's intention to issue unrestricted certificates as revealed by the compliance orders. In fact, the filing of the complaint in **Campbell Sixty-Six Express, Inc., v. Frisco Transportation Company**, 46 M. C. C. 222, in 1941, prior to the issuance of the certificates in question, completely negatives the notion that interested parties did not receive notice.

Finally, the appellants in No. 636 question the power of the Commission in any case to authorize the performance of an unrestricted motor vehicle operation by a rail-affiliated motor carrier through the purchase of certificates of independent motor carriers. Appellants allege that the decision of the District Court has the effect of ignoring Section 5 (2) (b) of the Interstate Commerce Act (formerly Section 213). This argument is based upon the construction of Section 5 (2) (b), that said section, without exception, requires the insertion of conditions in the certificate of a rail-affiliated motor carrier. A similar contention by the American Trucking Associations, Inc., in connection with the application of a rail-affiliated motor carrier for a certificate under Section 207 of the Interstate Commerce Act was recently rejected by this Court in **American Trucking Associations, Inc., v. United States of America**, Nos. 6 and 8, October Term, 1957, decided December 9, 1957.

It is also clear upon this record that the Interstate Commerce Commission does not share the opinion of the appellants that Section 5 (2) (b) of the Interstate Commerce Act must be so construed. In the argument before the District Court, Judge Van Oosterhout raised this specific question during the argument of counsel for the Interstate Commerce Commission.

> "Judge Van Oosterhout: Of course, in a particular case, the Commission would have had power if the record justified it to issue an unrestricted certificate?
>
> Mr. Johns: Now, we say yes; the ATA says no. We have a case in the Supreme Court today arguing that very point, that we may not grant an unrestricted certificate under any circumstances.
>
> Judge Van Oosterhout: At least the Commission thinks they have the power to do that?
>
> Mr. Johns: Yes, sir, in an unusual case.
>
> Judge Van Oosterhout: So it would be, in other words, the type of certificate here would have been the type of certificate that would have been within the power of the Commission to issue; it is just a question whether the proper findings were made?
>
> Mr. Johns: Proper findings were made. Yes, sir, if proper findings were made we think we could have issued the certificate. It would have to be based on evidence, of course, showing some good reason * * *" (Transcript of Argument below, June 19, 1956, pp. 129-130).

The Commission's action in this case with respect to the "Rose" certificate also negates such a construction of the statute as does its issuance of many other "unrestricted" certificates to appellee. See **Frisco Transportation Company—Purchase—C. F. Reddish** (February 5, 1940), 35 M. C. C. 132, which opinion also embraces **Frisco Transportation Company—Purchase—Mrs. B. T. Blake; Frisco Transportation Company—Purchase—Ozark Truck Lines,**

Inc. (March 18, 1940) 35 M. C. C. 255; **Frisco Transportation Company—Purchase—William B. Mayers** (December 31, 1942), 38 M. C. C. 820; **Frisco Transportation Company—Purchase—Keystone Freight Lines** (March 2, 1943), 39 M. C. C. 802; **Frisco Transportation Company—Purchase—Powell Bros. Truck Lines, Inc.** (July 10, 1943), 39 M. C. C. 809; **Frisco Transportation Company—Purchase—Luper Transportation Company** (August 24, 1943), 39 M. C. C. 813.

II.

The Questions Raised in No. 637 Are Not Substantial.

The Railway Labor Executives' Association and two railway labor unions, appellants in No. 637, raise three questions. The first deals with the authority of the Interstate Commerce Commission to impose conditions on the certificates of a rail-affiliated motor carrier for the purpose of insuring that the operations of such carrier are auxiliary to and supplemental of the train service of the parent railroad under four circumstances. It requires but a cursory reading of the opinion of the District Court to determine that many of the circumstances which were the basis of the District Court's opinion have been ignored by the appellants.

The circumstances outlined by the appellants do not include the issuance by the Commission of compliance orders which did not contain any limitation as to the type of service to be rendered by appellee. Nor do appellants consider that during the same period, i. e., between the issuance of the underlying finance reports (1939) and the certificates (1942), a certificate covering the Bennett route was issued (1940), in which the Commission reserved the right to further restrict, and that there was pending before the Commission at the time of the issuance of the certificate a complaint proceeding (the **Campbell Case**, supra), instituted by competing motor carriers alleging that the

reservation recited in the finance proceedings was applicable and the appellee was operating contrary to those conditions. As previously stated, this complaint was dismissed by the Commission in 1946 (46 M. C. C. 222). It is obvious therefore that question No. 1 presented by the appellants in No. 637 has little or no meaning in light of the relevant facts of this case.

Secondly, these appellants raise the question of whether or not under the circumstances enumerated in their question No. 1, the Commission has authority to impose conditions upon the certificates (which they assert were *ultra vires* of the Commission without such conditions) of a rail-affiliated motor carrier upon a finding that certificates not containing those conditions were inadvertently issued. We have shown that the Commission does not share the view that the unrestricted certificates were beyond its power. The District Court has found that under the decision in **Watson** the Commission's action in this case was an attempt made contrary to Section 212 (a) to revoke or change a certificate duly issued and was more than a mere correction of a clerical error. In so holding, the District Court did not in any way depart from the decisions in this Court; and in fact, as the District Court notes, the present case upon its facts presents a much stronger case than did **Watson** for holding that the Commission acted contrary to Section 212 (a).

Castle v. Hayes Freight Lines (1954), 348 U. S. 61, 64-65, indicates the strict construction which must be placed upon Section 212 (a). This Court's affirmance of the District Court in the **Watson** case demonstrates that an alleged clerical error offers no reason for relaxing the requirements of that section. Clearly, then, the District Court properly held that under Section 212 (a) the Commission's order should be enjoined. In **United States v. Rock Island Motor Transit**, 340 U. S. 419, 448, cited so often by appellants, this Court said:

"As under the statute, §§ 206, 207, 208, motor carriers must have certificates authorizing their operations, we conclude that the certificate is the final act or order that validates the operation. Until its form and content are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists."

Finally, appellants in No. 637 state that if their question No. 2 is answered in the affirmative, i. e., that the Commission has the power to impose conditions upon a finding that they were inadvertently omitted from the certificates, the further question is presented as to whether the evidence in support of the Commission's finding was adequate.

The District Court made a thorough and detailed examination of the record. In its finding of fact No. 22, it expressed the view of the facts that there was no evidence of record before the Commission which could be used as a basis for the finding that clerical error existed in the issuance of the certificates in question, and in its conclusion of law No. 16, the District Court concluded that the Commission's finding that the certificates were issued as a result of clerical error is without the support of adequate evidence.

There is literally no evidence in the record upon which a finding of inadvertence could be based. No employee of the Commission was called to describe the procedure followed in issuing the certificates. No evidence concerning the authority of any person engaged in the issuance of certificates was offered by the Commission.

The report of the Commission shows beyond question (l. c. 62 M. C. C. 375) that the Commission inferred the existence of "inadvertence" from two facts, viz., (1) appearance of a proviso in the finance report merely reserving a right to restrict the purchased operations in the

future if circumstances so required, and (2) its absence from the certificate issued several years later.

Such logic violates the rules set forth in the decision of this Court in **Pennsylvania Railroad v. Chamberlain** (1933), 288 U. S. 333. First, the two facts used by the Commission standing alone support the opposite but equally valid inference that the omission was intentional; and, second, uncontradicted evidence in the form of compliance orders (positive acts of the Commission) intervening between the finance reports and the issuance of the certificates ordering the issuance of unrestricted certificates prohibits the contrary inference that certificates were issued inadvertently.

The argument of these appellants in support of the substantial nature of the questions which they present asserts that the effect of the action of the District Court is to permit appellee to operate an "unrestricted motor carrier service totally unrelated to its parent railroad's operations" (Jur. St. No. 637, p. 20). Therefore, say appellants, the **Watson** case cannot be followed because to do so would validate an operation the Commission did not have the power to authorize. We have already noted that the Commission does not share this view of its power.

Furthermore, appellee's motor carrier system generally parallels the railroad system of its parent railroad not only as to the segments here involved, but as to all other segments.

In the "Cooper" and "Hamm" purchases the Commission said, "All points on vendor's route are also stations on the railway * * *" (l. c. 15 M. C. C. 318 and 15 M. C. C. 321). In the "Parker" and "Tolson" purchases it was phrased, "All principal points served by vendors are stations on the railroad, and others, while not directly served by the latter, are small towns not further removed from a station thereon than 10 miles" (l. c. 25 M. C. C. 99).

Appellants assert that the decision below is contrary to this Court's decision in the **Rock Island** case, 340 U. S. 419. That case determined that the Commission had the power to restrict the certificates of a rail-affiliated truck line **when the power to restrict is reserved in the certificate.** Here that power was not reserved; the certificates contain no such reservation.

The District Court recognized and followed the **Rock Island** holding in its action on the "Bennett" certificate. It also recognized and followed the **Watson** case in holding that the Commission's action on the "Cooper", "Hamm", "Parker" and "Tolson" certificates was contrary to Section 212 (a) which the **Rock Island** case recognizes as a bar to revocation of certificates except for willful failure to comply with the act or orders of the Commission (340 U. S. 435).

Appellants attempt to say that the following statement of this Court in **Rock Island** means that the present case has already been decided against appellee:

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself." (l. c. 340 U. S. 445-446.)

It should be noted that appellants construe the phrase "order directing the issue of the certificate" to mean "orders approving transportation company's purchases." The actual fact is that the compliance orders, used by the District Court as a part of the basis of their conclusion in this case, were actually the "orders directing the issue of the certificates."

Appellants then argue that even if this quotation from the **Rock Island** case does not constitute approval of the

Commission's action in this case, it leaves the question open for decision by this Court. We have already noted in connection with the third question presented in No. 636 that the Commission has never held that it did not have the power to issue unrestricted certificates to a rail-affiliated motor carrier. The question of that power is not properly presented for decision in these appeals because neither of the two bases of the opinion of the District Court necessitated any consideration of that question to finally determine this case.

These appellants would have the Court believe that the decision below deprives the Commission of its power, after notice and hearing, to enforce statutory requirements by correcting inadvertent errors. The opinion of the District Court and its findings of fact and conclusions of law do not hold that the Commission has no power to correct clerical errors. The District Court in this case limited its findings and conclusions to the facts presented by this case and holds that under **Watson** the action of the Commission is an attempt made contrary to Section 212 (a) to revoke and change a certificate and that the action of the Commission in this case is more than the mere correction of a clerical error. This obviously is the reason why the District Court examined the evidence in such detail and limited its opinion to the holding that the Commission's action here was more than a correction of a clerical error.

Appellants assert that this Court has recognized the Commission's power "to correct or revoke a certificate erroneously issued" citing **Riss & Co. v. United States**, 100 F. Supp. 468, 474, aff. 342 U. S. 937; and **United States v. Seatrain Lines**, 329 U. S. 424. Suffice it to say that the **Riss** case does not pass upon the Commission's power to revoke and correct a certificate on the ground of inadvertence. Furthermore, we submit that the **Seatrain** case and the **Watson** case demonstrate what has happened when the Commission purported to act upon the ground of inadvert-

ence. In both cases the courts found that the action of the Commission amounted to more than the correction of a clerical error.

III.

The Questions Raised in No. 651 Are Not Substantial.

The first question presented by the Interstate Commerce Commission, appellant in No. 651, is, for all practical purposes, the same as the first question presented by the appellants in No. 637. It deals with the power of the Commission to modify the certificates under certain circumstances. The Commission, rather than dealing with the exact circumstances, criticizes the District Court's opinion upon the ground that the power to correct a certificate (presumably it refers to one issued through alleged inadvertence) is "essential to the fulfillment of the objectives of the Interstate Commerce Act, and in fairness to private parties." (Jur. St. No. 651, p. 8.)

The Commission asserts that it

> "* * * has long held that, in the absence of unusual circumstances, motor carrier operations acquired by a railroad, or its affiliate must be restricted to service which is auxiliary and supplemental to the rail service." (Jur. St. No. 651, p. 8.)

In making this statement the Commission apparently chooses to overlook a statement made by it on December 23, 1943, more than a year after the certificates in question were issued, in **Pacific Motor Trucking Company—Purchase—Valley Motor Lines, Inc.**, 39 M. C. C. 441, 446-7, where, in passing upon the application of a rail-affiliated motor carrier to purchase the rights of an independent motor carrier, it said:

> "In **Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.**, 5 M. C. C. 9, herein called the **Barker case**, it was found that such a transaction could be

approved under that proviso when the evidence established that the motor-carrier operations proposed to be acquired could and would be used in service 'auxiliary or supplementary to train service' of the affiliated railroad. That principle has since been followed in appraising the evidence adduced to support the statutory finding in rail-motor acquisition cases. However, the meaning of the phrase 'auxiliary and supplementary to train service', as sometimes formerly used in acquisition cases has never been defined as to precisely what limitation of the operating authority was intended by those words. Evidence showing how such service could and would be rendered in various ways, if the transaction were approved, has been accepted and found sufficient to support the required statutory finding. Usually, such evidence has related to motor-carrier operations in combination and in coordination with the railroad's operations, resulting in expedited service, and savings for the railroad, but **no condition has heretofore been imposed in acquisition cases limiting the transportation authorized solely to transportation in combination with the railroad of the railroad's freight, or preventing the motor-carrier operations and service being made directly available to the shipping public apart from and in addition to the railroad's service.** The only definite restriction on the operating authority which was imposed in the **Barker case** and later cases has been designed to confine the motor-carrier operations acquired to the territory of the railroad through limiting the rights so as to authorize service only at stations on the railroad. Although, at times, a condition formerly was sometimes included in acquisition cases to the effect that service to be rendered should be 'auxiliary and supplementary' to the railroad's service, **there has been no indication in the reports that such condition was intended to prohibit rendition of all motor-carrier serv-**

> ice directly for the shipping public under the operating rights in addition to, in substitution for, and in lieu of, the parent railroad's service, or to restrict the operation solely to one in combination with the railroad's operation; nor is it our understanding that it has been so construed by the carriers. In other words, evidence upon which affirmative action has often been based, and the finding made that the resulting service would be auxiliary and supplementary to that of the railroad, has been based upon a motor-carrier operation in addition to, in substitution for, and in lieu of, the railroad's operation, as well as upon an operation in combination with the railroad. Southwestern Trans. Co.—Purchase—Hill and Howe, 37 M. C. C. 83, in which petition for reconsideration was denied by the Commission March 2, 1942." (Emphasis added.)

The attempt by the Commission to intimate that failure to include the restrictions in appellee's certificates would "revoke *pro tanto*" the requirements of Section 5 (2) (b) is also useless because the finance reports covering the "Cooper", "Hamm", "Parker" and "Tolson" purchases reveal that findings which completely comply with Section 5 (2) (b) (formerly Section 213) were made. See 15 M. C. C. 317, 319; 15 M. C. C. 320, 322; 25 M. C. C. 96, 100.

The Commission's assertion that fairness to competing carriers and other private parties requires that the Commission be empowered to correct clerical errors in a certificate is completely answered, we submit, by decision in **Watson** and by the decision of the District Court in this case, for it will be noted that the District Court has merely held that under **Watson** the Commission's action in this case is an attempt to revoke a certificate contrary to Section 212 (a) and is more than the mere correction of a clerical error. Nothing in the opinion of the District Court or in its findings can be construed as holding that the Commission may not correct clerical errors if they are truly "clerical" in character and if proper procedure is followed.

The Commission asserts that "Any suggestion that the Commission deliberately ordered the issuance of certificates inconsistent with the findings and conditions in its reports is without support in the record and impeaches the integrity of the Commission's reports as the necessary basis for its orders" (Jur. St. No. 651, pp. 12-13). We refer again to the compliance orders. The very language of the compliance orders and the certificates in these proceedings refutes the claim that their issuance was merely "a routine function performed by subordinate employees of the Commission and not reviewed by the entire Commission or by a Division" (Jur. St. No. 651, p. 12).

In **Ozark Truck Lines, Inc., Common Carrier Application**, 32 M. C. C. 459, which was decided on February 19, 1942, prior to the issuance of the certificates here in question, the Commission specifically commented upon the compliance orders entered in "Hamm" and "Cooper" and recognized that the compliance orders in those purchases were intended to direct the issuance of unrestricted certificates (l. c. 32 M. C. C. 460).

The second question presented by the Commission seeks a determination of whether the District Court erred in finding that the omission of the reservation from the certificate was a result of a change in the Commission's policy rather than of inadvertence or clerical error. The District Court's comment was "what the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such" (l. c. 153 F. Supp. 578). It is readily apparent that the Commission has misconstrued this comment by the District Court because, before so commenting, the Court had first held that the Commission's action was more than a mere correction of a clerical error and actually amounted to a revocation of a certificate contrary to the provisions of Section 212 (a) and that the

Commission's finding that the certificates were inadvertently issued was not supported by adequate evidence. That the District Court's comment obviously represents only its view of the Commission's purpose and is not the reason for its decision is plainly evident from the findings of fact and conclusions of law which set forth only two bases for the decision either of which, the District Court concluded, was sufficient to require that the order be enjoined. (See Conclusions of Law 15, 16, 17.)

It is noteworthy that the Commission apparently chooses to ignore its decision in **Smith Bros. Revocation of Certificate** (1942), 33 M. C. C. 465, 42 M. C. C. 211, where in passing upon its power under Section 212, the Commission said:

> "In our opinion, the language of [Section 212 (a)] is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding" (l. c. 33 M. C. C. 472).

This statement by the Commission was one of the authorities relied upon by the District Court in concluding that the action of the Commission in this case was more than a mere correction of a clerical error.

CONCLUSION.

For the reasons above stated, we submit that the opinion of the District Court should be affirmed since it is in full accord with the **Watson** case (132 F. Supp. 905, aff. 350 U. S. 905), the Rock Island case (340 U. S. 419), and the Seatrain case (329 U. S. 424) and the long line of decisions requiring that orders of the Commission be supported by adequate evidence. Either of the basic reasons advanced in that opinion for enjoining the order of the Commission in part is sufficient to require that the Commission's order be enjoined, and both of them are based upon a close examination of the record in this case and the decisions of this Court. Not one of the questions presented in the three jurisdictional statements offers any substantial reason why there should be further argument.

Respectfully submitted,

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Attorneys for Appellee.

January 3, 1958.

Of Counsel:
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Certificate of Service.

I, Ernest D. Grinnell, Jr., one of the attorneys for appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 2nd

day of January, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Wayne H. Bigler, Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and to The Solicitor General and Maurice A. Fitzgerald, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Robert Ginnane, its General Counsel, at the offices of the Commission, Washington 25, D. C., and to Charlie H. Johns, Jr., its Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Railway Labor Executives' Assn. et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to James L. Highsaw, Jr., and Edward J. Hickey, Jr., 620 Tower Building, Washington, D. C., to Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri, and to Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio.

4. On the American Trucking Associations, Inc., et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to Gregory M. Rebman and B. W. LaTourette, 1230 Boatmen's Bank Bldg., 314 North Broadway, St. Louis 2, Mo.; to Wentworth E. Griffin, 1012 Baltimore Street, Kansas City, Mo., and to Peter T. Beardsley, 1424 Sixteenth St., N. W., Washington 6, D. C.

Ernest D. Grinnell, Jr.

APPENDIX 1.

Order.

At a Session of the Interstate Commerce Commission, Division 5, Held at Its Office in Washington, D. C., on the 14th Day of March, A. D. 1939.

No. MC 89913 Sub 1*

Application of Frisco Transportation Company, a Corporation, St. Louis, Missouri.

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had:

It further appearing, That applicant or predecessor in interest was on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification **set forth as appended on reverse side hereof or attached hereto** and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Car-

* This order embraces the authority applied for under Docket No. MC 29652, John Hamm, d/b/a Southwest Freight Line, Joplin, Mo., purchased by the applicant named herein pursuant to Finance Docket No. MC-F-618, approved November 30, 1938.

rier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, **governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,** a certificate of public convenience and necessity shall be issued, **unless otherwise ordered,** authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification **set forth as appended on the reverse side hereof or attached hereto** and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein **within 30 days from date of this order;** then said applicant shall show cause, if any there be, **within 60 days from the date of this order,** why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(Seal)

Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 14th day of March, A. D. 1939.

No. MC 89913 Sub 1*

Application of Frisco Transportation Company, a Corporation, St. Louis, Missouri.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of the commodities indicated, over regular routes, between fixed termini, and to and from intermediate points, is as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household moving"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Joplin, Mo., and Miami, Okla., as follows:

From Joplin over U. S. Highway 66 to Baxter Springs, Kans., thence over U. S. Highway 166 to junction U. S. Highway 69, thence over U. S. Highway 69 to Miami;

From Joplin over U. S. Highway 66 to Miami; and

Return over these routes to Joplin.

All intermediate points on the above-specified routes.